

FILED BY CLERK

AUG 28 2007

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:)	2 CA-CV 2007-0022
)	DEPARTMENT A
GASTON P. JENNETT III,)	
)	<u>MEMORANDUM DECISION</u>
Petitioner/Appellant,)	Not for Publication
)	Rule 28, Rules of Civil
and)	Appellate Procedure
)	
REBECCA TICE JENNETT,)	
)	
Respondent/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D2006-2022

Honorable Carmine Cornelio, Judge

AFFIRMED

Benavidez Law Group, P.C.
By Jennifer N. Manzi

Tucson
Attorneys for Petitioner/Appellant

John J. McFadden, Jr.

Tucson
Attorney for Respondent/Appellee

H O W A R D, Presiding Judge.

¶1 Appellant Gaston P. Jennett appeals from the trial court’s decree entered after a bench trial on limited issues dissolving his marriage to appellee Rebecca Tice Jennett. He claims the trial court abused its discretion by ordering him to pay spousal maintenance and attorney fees. Finding no error, we affirm.

Facts and Procedural Background

¶2 In reviewing a trial court’s decision concerning spousal maintenance, we view the evidence “in the strongest manner in favor of the appellee.” *Rossi v. Stewart*, 90 Ariz. 207, 209, 367 P.2d 242, 244 (1961); *see also Thomas v. Thomas*, 142 Ariz. 386, 390, 690 P.2d 105, 109 (App. 1984). The Jennetts were married for over thirty-one years, during which Gaston obtained a master’s degree in systems management. By the time of trial, he had been employed as an engineer for a major Tucson employer for over ten years. Rebecca had held a variety of mostly part-time jobs during the marriage and primarily had stayed home to care for the couple’s three children.

¶3 At the time of the divorce, all three children were emancipated, and Rebecca was working as a “family support partner.” The evidence showed Gaston’s monthly net income was \$7,493, and his living expenses totaled \$4,518. It further showed Rebecca’s monthly net income was \$1,847 and her living expenses \$4,015, leaving a difference of \$2,168 per month.

¶4 The trial court found Rebecca lacked sufficient property to provide for her needs, was unable to be self-sufficient through appropriate employment, had been in a

marriage of long duration, and was of an age that may preclude adequate employment to be self-sufficient. *See* A.R.S. § 25-319(A)(1), (2), and (4). It then awarded her spousal maintenance of \$2,250 per month for an indefinite duration. The court stated:

We have a 31-year marriage, we have a standard of living that the respondent will, based on her significant difference, differential in earnings, not be able to come close to maintaining. It's clear that she is earning at or near the top of what she is going to be able to earn. And while both parties come out of the marriage with equalized assets, the court's got to look at the other factors and the history of the relationship.

The court also found that it was unreasonable for Gaston to contend that no spousal maintenance should be awarded and, after considering the financial resources of both parties, awarded Rebecca attorney fees in the amount of \$6,152. *See* A.R.S. § 25-324. Gaston challenges the awards of both spousal maintenance and attorney fees.

Spousal Maintenance Award

¶5 Gaston argues the trial court abused its discretion by awarding Rebecca spousal maintenance, contending she did not meet any of the requirements in A.R.S. § 25-319(A).¹ We will uphold the trial court's factual findings on the statutory criteria required to support an award of spousal maintenance "if there is any reasonable evidence to support the judgment of the trial court." *Thomas*, 142 Ariz. at 390, 690 P.2d at 109. We review the

¹In addition to the arguments addressed in this decision, Gaston contends Rebecca did not meet the requirements of § 25-319(A)(3) concerning spousal contribution to educational opportunities. As Rebecca notes, the trial court did not rely on § 25-319(A)(3). Therefore, we do not address that issue.

award of spousal maintenance for an abuse of discretion. *Deatherage v. Deatherage*, 140 Ariz. 317, 319, 681 P.2d 469, 471 (App. 1984). Awarding spousal maintenance when the requirements of § 25-319(A) are not met is an abuse of discretion. *See McDermott v. McDermott*, 129 Ariz. 76, 77, 628 P.2d 959, 960 (App. 1981) (award of spousal maintenance vacated where “trial court concede[d] . . . appellee did not bring herself within the statute”).

¶6 Section 25-319(A) permits a court to order maintenance if the evidence establishes that the spouse seeking it:

1. Lacks sufficient property, including property apportioned to the spouse, to provide for that spouse’s reasonable needs[;]

2. Is unable to be self-sufficient through appropriate employment . . . or lacks earning ability in the labor market adequate to be self-sufficient[; or]

. . . .

4. Had a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient.

Although a principal goal of § 25-319 is to encourage spouses to become self-sufficient, that policy “‘must be balanced with some realistic appraisal of the probabilities that the receiving spouse will in fact subsequently be able to support herself in some reasonable approximation of the standard of living established during the marriage.’” *Rainwater v. Rainwater*, 177

Ariz. 500, 503, 869 P.2d 176, 179 (App. 1993), *quoting Sommerfield v. Sommerfield*, 121 Ariz. 575, 578, 592 P.2d 771, 774 (1979).

¶7 Gaston first argues that the trial court abused its discretion in finding Rebecca satisfied § 25-319(A)(1), that is, lacked sufficient property to provide for her reasonable needs. He notes Rebecca was awarded \$102,000 in liquid assets in the property distribution and is “free to invest this money so that it will generate income to protect her future.”

¶8 Gaston does not offer any calculations demonstrating how Rebecca could use the income from these funds to support her reasonable needs. On the other hand, Rebecca argues that, “[e]ven assuming a 5% return on the entire \$101,330 net cash distribution [she] received from the property division if she did not buy a modest house, she would only earn \$5,067 interest per year, or \$422 per month.” This amount would fall far short of covering the \$2,168 monthly gap between her projected income and her expenses. Gaston does not dispute Rebecca’s calculations in his reply brief.

¶9 Additionally, although the decree grants Rebecca approximately \$102,000 in liquid assets, the record reflects that Rebecca reasonably intended to use a substantial portion of this money for a down payment on a modest house and the purchase of a car to replace one that had high mileage and had recently been damaged in a collision. Therefore, the trial court could reasonably find that the entire asset distribution would not be available to produce income.

¶10 Finally, Rebecca is not required to use up the principal and income of all available assets to pay her living expenses. *See Thomas*, 142 Ariz. at 391, 690 P.2d at 110. Therefore, the record supports the trial court’s finding that Rebecca lacks sufficient property to provide for her reasonable needs. That finding alone supports the maintenance award.

¶11 Nonetheless Gaston argues the trial court abused its discretion in finding Rebecca’s earning ability was insufficient to meet her needs under § 25-319(A)(2) and (4). The parties had a marriage of long duration, thirty-one years. Rebecca was fifty-two years old and was earning a net monthly income of \$1,847, substantially less than her \$4,015 in monthly expenses. The trial court could properly find, based on her age, sporadic work history, and limited experience, that Rebecca would not be able to significantly increase her earning ability.

¶12 Gaston, however, claims this case is similar to *Rowe v. Rowe*, 154 Ariz. 616, 621-22, 744 P.2d 717, 722-23 (App. 1987), in which the trial court’s decision not to grant spousal maintenance was upheld based on the wife’s ability to support herself. But, unlike Rebecca, the wife in *Rowe* was “young, ha[d] an employment history, and was found to be only temporarily unable to support herself by employment.” *Id.* Thus, *Rowe* is readily distinguished on its facts.

¶13 Gaston also mentions that Rebecca has been living on her own since moving out of the marital residence and spent money on their son’s car insurance while the son was living with her. But Rebecca testified at trial that she had had to incur debt to support

herself during this time. This evidence does not establish that the trial court erred as a matter of law in finding Rebecca's income and earning ability inadequate for her to be self-sufficient.

¶14 Furthermore, at most, evidence that Rebecca had been living on her own and contributing to her son's car insurance merely contradicts the other evidence that supports the trial court's ruling. When reviewing the trial court's findings of fact on appeal, we will not re-weigh conflicting evidence. *O'Hair v. O'Hair*, 109 Ariz. 236, 240, 508 P.2d 66, 70 (1973). "[T]he duty of a reviewing court begins and ends with the inquiry whether the trial court had before it evidence which might reasonably support its action viewed in the light most favorable to sustaining the findings." *Id.*

¶15 Finally, in his reply brief, Gaston disputes Rebecca's claim that he conceded the reasonableness of her calculated living expenses. Gaston then challenges the reasonableness and accuracy of those expenses in support of his argument that she is able to be self-sufficient. Because Gaston did not challenge the reasonableness of Rebecca's projected living expenses in his opening brief, he waived the issue. *See In re Marriage of Pownall*, 197 Ariz. 577, n.5, 5 P.3d 911, 917 n.5 (App. 2000) (arguments raised for first time in reply brief are generally deemed waived).

¶16 In sum, reasonable evidence supports the trial court's factual findings, which, in turn, demonstrate that Rebecca met the requirements of § 25-319(A)(1), (2), and (4). Therefore, the trial court did not abuse its discretion in awarding spousal maintenance.

Award of Attorney Fees

¶17 Gaston challenges the trial court's order that he pay Rebecca's attorney fees in the amount of \$6,152. We review an award of attorney fees for an abuse of discretion. *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 32, 972 P.2d 676, 684 (App. 1998). Section 25-324, A.R.S., permits a court to order one party in a dissolution action to pay the attorney fees of the other party "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings."

¶18 At trial, the court stated it would award Rebecca approximately half of her attorney fees after finding that the parties had a "gross disparity in income" and that Gaston had been unreasonable in taking the position that no spousal maintenance should be awarded. As we observed above, the evidence established Gaston had much higher earnings and a much greater earning potential than Rebecca. And the record supports the trial court's finding that Gaston was unreasonable in claiming that Rebecca was not entitled to any spousal maintenance. We find the trial court did not abuse its discretion in awarding attorney fees.

Conclusion

¶19 Finding no abuse of discretion in either the award of spousal maintenance or the award of attorney fees, we affirm the trial court's judgment. Pursuant to A.R.S. § 25-324, Rebecca has requested that Gaston pay the attorney fees she has incurred in defending this appeal. Based upon the financial position of the parties, as reflected in the financial

statements they filed below and as found by the trial court, and upon Gaston's unreasonableness in appealing discretionary orders that were well supported by the record, we grant Rebecca her reasonable attorney fees incurred in defending this appeal upon compliance with Rule 21, Ariz. R. Civ. App. P., 17B A.R.S.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge